

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
SOUNDBITE COMMUNICATIONS, INC.)	CG Docket No. 02-278
)	
Petition for Declaratory Ruling)	
_____)	

To: The Commission

COMMENTS OF VERIZON AND VERIZON WIRELESS

Verizon and Verizon Wireless (“Verizon”) support industry efforts to protect consumers from unwanted telephone calls, particularly calls to mobile numbers, and participate in industry best practices designed to provide transparency to consumers and protect their privacy.

Consistent with these efforts, Verizon supports grant of the Petition for Declaratory Ruling filed by SoundBite Communications, Inc. (“SoundBite”), regarding the legality of text message confirmations of a customer’s opt-out decision under the Telephone Consumer Protection Act (“TCPA”) (47 U.S.C. § 227) and the Commission’s rules implementing the TCPA (47 C.F.R. §§ 64.1200 *et seq.*).

In granting the Petition, the Commission should declare that a text message sent to a consumer’s mobile telephone number solely to confirm that the consumer has opted out of a commercial services or advocacy campaign using the short message service (“SMS”) does not violate the TCPA and the Commission’s rules implementing the TCPA.

Grant of the Petition is consistent with the wireless industry’s efforts to ensure that wireless customers do not receive unwanted text messages, particularly in light of the growing

problem of text message spam.¹ Verizon alone has initiated nearly 20 separate lawsuits against text message spammers for violating the TCPA and/or the CAN-SPAM Act,² demonstrating its commitment to the protections offered by the TCPA to consumers.³ The opt-out confirmation messages that are the subject of SoundBite’s Petition do not violate the TCPA and in fact serve a beneficial customer purpose consistent with the TCPA. Accordingly, Verizon supports the Petition and urges the Commission to grant the Petition on the bases described herein.

I. MESSAGES CONFIRMING A SUBSCRIBER’S OPT-OUT DECISION ARE AN INTEGRAL PART OF WIRELESS INDUSTRY GUIDELINES.

Text messaging is a service that wireless operators offer to their customers to send and receive short data messages. Verizon Wireless’ SMS product enables its subscribers to exchange messages not only with other Verizon Wireless-affiliated handsets, but also, through guidelines adopted by CTIA—The Wireless Association®, with handsets associated with other wireless service providers. SMS has become a very popular means of person-to-person communications; the Verizon Wireless network handles over 60 billion texts monthly.

SMS can also be used to send commercial and advocacy messages. The vast majority of commercial entities use common short codes, or “CSCs,” rather than 10-digit numbers as the base number for such a campaign.⁴ CSCs are 5- and 6-digit numbering codes that have been set aside by the wireless industry for common use in commercial or advocacy text messaging campaigns so that the CSCs work across all participating wireless companies’ networks. CSCs enable advertisers or other third parties to reach multiple customers by promoting a single code

¹ N. Perloth, “Spam Invades a Last Refuge, the Cellphone,” *New York Times*, p. 1 (Apr. 7, 2012).

² Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003, 15 U.S.C. §§ 7701-7713.

³ The Commission has ruled that text messages to a wireless telephone number are “calls” within the meaning of the TCPA. *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd 14014, 14115 (2003) (“2003 TCPA Order”).

⁴ An increasing number of developers are using 10-digit telephone numbers to launch commercial SMS campaigns. Verizon Wireless recommends that these providers use opt-in/opt-out procedures similar to those used for CSC campaigns if certain other protections for consumers are not in place.

loaded into the networks of participating wireless operators. Wireless companies have implemented thousands of CSC campaigns that have proliferated in response to various consumer interests.

An SMS-based commercial campaign typically imposes standard text messaging charges on a subscriber and also may entail premium charges in the form of a subscription or one-time charge to receive specific content. Pursuant to the Mobile Marketing Association (“MMA”) best practices⁵ and the requirements of wireless carriers, consumers must have the opportunity to opt in to participate in an SMS-based campaign, and there must be a double opt-in for any campaign with premium charges.⁶ Generally, the process by which a wireless subscriber consents, or opts-in, for a premium charge campaign, sends and receives messages in that campaign, and opts-out of the campaign, is as follows:

- A consumer sends a text message “start” to the short code reserved for a premium charge content service, or signs up on a website in order to register for receipt of the premium content advertised by the content provider.
- The messaging aggregator for the content provider’s campaign receives the “start” message from the subscriber at its messaging hub, and sends the subscriber a text message that includes the amount of the premium charge, and asks the subscriber to verify that he accepts the charge.
- In order to complete the opt-in process, the subscriber must then respond with a text message accepting the premium charge.
- After the messaging hub receives confirmation of approval of the charge, the hub sends a message to the subscriber with thanks for participation.
- If the campaign sends periodic information, the content provider delivers content to its messaging aggregator, and the aggregator sends a text message with the content attached to the registered participants.
- When subscribers to a campaign want to unsubscribe, they send a “stop” or “cancel” message to the short code, which registers at the hub, and the hub

⁵ Mobile Marketing Association, *U.S. Consumer Best Practices Version 6.1* (May 2, 2011).

⁶ *Id.* at §§ 1.5-1.6. Similar procedures can be used for campaigns based on 10-digit telephone numbers.

responds with a text message confirming that the subscriber has opted out of receiving additional messages.

As SoundBite points out (Petition, at 2-3), the confirmatory opt-out message is part of the MMA best practices, as well as CTIA's compliance guidelines for such campaigns.⁷ The confirmatory text message is strictly informational,⁸ solely to confirm the opt-out election, and is delivered within a reasonably short time frame, usually within minutes after the consumer's opt-out message. It is akin to the standard practice followed by email marketers who typically respond to requests to unsubscribe from email campaigns with a confirmation that the requests have been received and processed. The opt-out confirmation message provides important information to consumers, and is simply not the type of unwanted call targeted by the TCPA.

II. TEXT MESSAGES CONFIRMING A CONSUMER'S DECISION TO OPT-OUT ARE WITHIN SCOPE OF A CONSUMER'S CONSENT TO PARTICIPATE IN CAMPAIGN TRANSACTIONS.

As described above, for SMS-based campaigns, the MMA best practices, CTIA compliance guidelines, and carrier requirements all mandate that a subscriber must affirmatively opt in to participate in the marketing campaign, consistent with the TCPA requirement for prior express consent for calls to wireless numbers (47 U.S.C. § 227(b)(1)(A)(iii)). All campaigns are also required to incorporate various functions to assist the user in navigating the campaign, including a "help" function and a "stop" function. If the subscriber wants to unsubscribe from the campaign, he simply sends a "stop", "cancel" or a similar message to the campaign. In response, the campaign hub sends a confirmatory message, informing the consumer that his decision to opt-out of the campaign has been received and has been registered with the account.

⁷ CTIA Compliance Monitoring and Enforcement Playbook, at 17, 20 (Oct. 25, 2011), available at http://www.wmcglobal.com/images/CTIA_playbook.pdf.

⁸ Messages covered by the requested declaration should not include upsells, surveys, or other commercial purposes. When the customer has subscribed to multiple campaigns with the same content provider, the "stop" message may require clarification whether the opt-out is directed to one or all campaigns. In that case, the response will be a query as to which campaigns the opt-out applies to. *See MMA Best Practices*, § 1.6-3. After the consumer makes her selections, she will receive the opt-out confirmation.

No further messages can be sent to the subscriber's telephone number by that campaign consistent with these practices.

Plaintiffs in the class action litigation referenced by SoundBite (Petition, at 1-2) apparently assume that once a subscriber sends a "stop" message, any further messages, including the confirmation of receiving that opt-out message, are calls made without consent. This is incorrect. It divorces the opt-out message from the context in which it is sent, and ignores the fact that Congress did not target in the TCPA "normal business communications" for which the customer has provided his number.⁹ When the subscriber has opted in to receive messages from the campaign, the better view, which the FCC should follow,¹⁰ is that the confirmatory opt-out message is part of the interaction between the campaign and consumer and is incorporated within his prior express consent to participate in the campaign. Once a subscriber has consented to participate in the campaign, he has consented to receive not only the substantive sales and advocacy messages, but also any informational messages regarding the campaign. For example, if the content owner were to shift the short code for the campaign, it would have to send a message instructing the subscriber to "start" the campaign with a new number.¹¹ The fact that the subscriber had not specifically consented to receive a "change in number" message should not mean that sending such a message is a violation of the TCPA.

So too, the confirmatory opt-out message should be deemed part and parcel of the messages for the campaign in which the subscriber has consented to participate. It is strictly a one-time, informational response to a request by the subscriber made within the campaign

⁹ *Request of ACA International for Clarification and Declaratory Ruling*, 23 FCC Rcd 559, 564 (2007), quoting H.R. Report 102-317, at 17.

¹⁰ The Commission has discretion to decide when "prior express consent" is present within the context of the TCPA. *See, e.g., Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, FCC 12-21, ¶ 21 (released Feb. 15, 2012) ("2012 TCPA Order") (noting TCPA is silent on what form of express consent is required for autodialed calls); *ACA International Declaratory Ruling*, 23 FCC Rcd at 564 (finding that provision of a cell phone number with a credit application constitutes prior express consent for calls regarding the debt).

¹¹ *See MMA Best Practices*, § 1.7.

parameters. The subscriber has signaled his intention to stop participation in the campaign; he has not withdrawn consent to receive an acknowledgement of that withdrawal within the parameters of the campaign.

Moreover, once a consumer has provided his or her number to a campaign, consistent with prior Commission decisions, the consumer has consented to receive transactional messages related to that campaign. This would be true whether the consumer originally opted in to receive all messages from the campaign, or simply provided his or her number in a request for a specific action by the campaign to stop sending further messages.¹²

The Commission has found that consumers who provide their mobile telephone numbers to a third party have consented to receive calls from that party about the transaction in which the two parties are engaged.¹³ The same reasoning applies in this context, particularly given the narrow circumstances in which the opt-out confirmation is sent. For these customers, making a request within the campaign should be deemed consent for the confirmation message.

These interpretations of the consent requirement are consistent with the parallel protections offered by the CAN-SPAM Act and the Commission's rules implementing CAN-SPAM for messages sent to electronic mail addresses. Those rules permit the sending of "transactional or relationship messages" to electronic mail addresses without any prior consent. Such messages include messages the primary purpose of which is "to provide . . . notification of a change in the recipient's standing or status with respect to . . . a subscription, membership, account, loan, or comparable ongoing commercial relationship involving the ongoing purchase

¹² The majority of consumers who receive the opt-out confirmation have already opted into the campaign. For a minority, the "stop" message will be a response to a text sent by mistake from the campaign, for example, when the consumer's number was re-assigned from a customer who had opted in to the campaign, and the prior customer's account deactivation had not been registered with the campaign. The customer who currently holds the number can cancel further texts using the "stop" function. She then will receive a confirmation text. Unless such action is deemed consent, consumers would be able to invent TCPA violations simply by texting "stop" to a valid short code.

¹³ *ACA International Declaratory Ruling*, 23 FCC Rcd at 564 (finding that provision of a cell phone number with a credit application constitutes prior express consent for calls regarding the debt).

or use by the recipient of products or services offered by the sender.”¹⁴ Confirmatory messages responding to opt-out requests provide notification of a change in the consumer’s relationship with the SMS-based campaign.¹⁵ In the CAN-SPAM Act, Congress recognized that such relationship messages are not the types of messages that consumers object to as unwanted. That should be equally true in the limited circumstances raised by the Petition.

Accordingly, the Commission should find that that the one-time message confirming the termination of a subscription to an SMS-based marketing and/or advocacy campaign is encompassed within the prior express consent provided by subscribers when they decide to participate in campaign transactions.

III. THE COMMISSION SHOULD ENCOURAGE PRO-CONSUMER BUSINESS PRACTICES SUCH AS CONFIRMATION OF THE CUSTOMER’S DECISION TO WITHDRAW CONSENT.

The MMA guidelines are designed to promote transparency so that customers fully understand and control their participation in mobile marketing campaigns. For this reason, the guidelines rely on informational messages both to opt in and opt out of campaigns to ensure that customers know their status within the parameters governing the campaign. The double opt-in for premium campaigns is designed to ensure that the subscriber knows of and consents to any charges associated with the campaign. The one-time confirmatory opt-out ensures that the customer knows his opt-out has been received and registered, and that he will not receive additional messages.¹⁶

¹⁴ 47 C.F.R. § 64.3100(c)(8); see 15 U.S.C. § 7702(17); *Rules and Regulations Implementing the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003*, 19 FCC Rcd 15927, 15951-52 (2004).

¹⁵ Indeed, a confirmatory opt-out message could be sent to the consumer’s wireless number in an email address (123-456-7890@vtext.com), which is delivered as a text message. The customer receives the same information and pays the same for receipt of either message. In this limited context, it appears arbitrary to deem a message sent directly to the mobile telephone number illegal, while the same message sent to an electronic mail address incorporating the same telephone number is permissible.

¹⁶ These are industry practices that help “resolve issues of importance to consumers without the imposition of unduly burdensome or unnecessary regulation” that the Commission has committed to promote in order to

These messages are consistent with the TCPA and the Commission’s rules implementing the TCPA because they protect the privacy interests of consumers as well as the legitimate business interests of commercial entities.¹⁷ If the consumer has already opted-in to receive messages from the campaign, he is not being texted from an unknown source. Indeed, the message is simply confirming to the consumer his own request. For the content provider, the confirmation represents a basic courtesy to the subscriber, as recognized throughout the mobile marketing ecosystem, and thus is “use[d] in normal business communications,” with a customer who usually initiated the communications with his mobile telephone number.¹⁸ The Commission should ensure that this beneficial practice continues by finding that the message falls within the customer’s consent, or outside the restrictions of the TCPA (as discussed below), and, therefore, that the opt-out confirmation does not violate the TCPA.

IV. CONFIRMATORY OPT-OUT MESSAGES TO A CONSUMER’S WIRELESS DEVICE ARE NOT “CALLS” PRECLUDED BY THE TCPA.

The prohibition on autodialed calls to wireless numbers in the TCPA is designed to prohibit the use of randomly or sequentially generated telephone calls, usually in bulk quantities, typically for telemarketing purposes.¹⁹ A text message directed to a single telephone number, for the purpose of responding to a request from that number, uses neither a “random” nor “sequential” number generation process, and, therefore, falls outside the TCPA.²⁰ Even if the equipment used to generate such responses taken as a whole has the “capacity” to store and call

implement President Obama’s recent deregulatory initiatives. *See Preliminary Plan for Retrospective Analysis of Existing Rules*, at 23 (Nov. 7, 2011); Executive Order 13563, § 4, 76 Fed. Reg. 3821 (Jan. 18, 2011) (“each agency shall identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public”).

¹⁷ *See, e.g., Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 7 FCC Rcd 8752, 8754 (1992) (“1992 TCPA Order”).

¹⁸ *ACA International Declaratory Ruling*, 23 FCC Rcd at 564.

¹⁹ *2012 TCPA Order*, ¶ 4; *2003 TCPA Order*, 18 FCC Rcd at 14115.

²⁰ *See 1992 TCPA Order*, 7 FCC Rcd at 8776 (messaging services fall outside TCPA when “the numbers called are not generated in a random or sequential fashion”).

telephone numbers using random or sequential number generation (47 U.S.C. § 227(a)(1)) through other features or functions, the equipment is not being used for that capability when it sends a single responsive text message.

While sending a single text message to a wireless number that responds to action requested by the subscriber does not raise the same concerns as telemarketing robocalls, the Commission's interpretation of "automatic telephone dialing system" in the TCPA and its rules (47 C.F.R. § 64.1200(f)(1)) has broadly encompassed almost any "dialing" process except manual dialing.²¹ SoundBite states (Petition, at 5-7) that the calling process it uses for confirmatory text messages does not include the capability for automatic telephone number generation. However, in order to provide sufficient guidance for this consumer-friendly practice, the Commission should not focus on individual equipment and/or software, but how that equipment and software is being used.

In the confirmatory text message situation, whatever the capacity of the equipment in all its parts and components, the "equipment" involved in sending confirmatory messages is not relying on the "capacity" to store or produce randomly or sequentially generated numbers for initiating calls to large numbers of consumers. Rather, the equipment is *reacting* to a request from a *single* telephone number and sending a *single* response. Accordingly, the Commission should find that when the function of "equipment" is simply to confirm an individual consumer's opt-out request from a specific mobile telephone number, such equipment does not fall within the definition of "automatic telephone dialing system" with respect to such messages. Such limited, one-time opt-out confirmations are not the types of messages that were of concern to Congress in prohibiting autodialed calls, and so, interpreting the term "capacity" broadly in this context is unnecessary. Therefore, a one-time text message confirming a customer's prior

²¹ See, e.g., *2003 TCPA Order*, 18 FCC Rcd at 14091-93.

message opting out of an SMS-based campaign should be deemed to fall outside the TCPA's prohibition on use of autodialers for calls to wireless telephone numbers.²²

V. CONCLUSION

For the reasons set forth above, the Commission should grant the Petition and declare that a text message sent to a consumer's wireless telephone number solely to confirm that the consumer has asked to "opt out" of a certain SMS-based commercial or advocacy campaign does not violate the TCPA and the Commission's rules implementing the TCPA.

Respectfully submitted,



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²² By using this interpretation of "automatic telephone dialing equipment," the Commission can resolve the status of confirmation texts following opt-outs by both those consumers who have expressly consented to participate in the campaign and those who receive messages by mistake. *See supra* note 12.